SUPREME COURT OF THE UNITED STATES

No. 03–9685

ROBERT JOHNSON, JR., PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 4, 2005]

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SCALIA and JUSTICE GINSBURG join, dissenting.

The Court took this case to determine whether a vacatur is a "fact," as that term is used in 28 U. S. C. §2255, ¶6(4), thus commencing the statute's 1-year limitations period. The question divides the Courts of Appeals. Today the Court holds that the order of vacatur is the fact that begins the limitations period. On that point, I agree. Surprisingly, however, the Court proceeds to announce a second requirement of its own design: In order to obtain relief under §2255, ¶6(4), petitioner must show he used due diligence in seeking the vacatur itself. On this point, I disagree.

In my view the Court's new rule of prevacatur diligence is inconsistent with the statutory language; is unnecessary since States are quite capable of protecting themselves against undue delay in commencing state proceedings to vacate prior judgments; introduces an imprecise and incongruous deadline into the federal criminal process; is of sufficient uncertainty that it will require further litigation before its operation is understood; and, last but not least, drains scarce defense resources away from the prisoner's federal criminal case in some of its most critical stages. For these reasons, I submit my respectful dissent.

I

The question on which we granted certiorari is this: "When a federal court bases an enhanced sentence on a vacated state conviction, is the vacatur of the state conviction a 'fact' supporting a prisoner's 28 U. S. C. §2255 claim requiring reduction of the prisoner's sentence?" Pet. for Cert. i. In a change from the position it took in the Court of Appeals, the Government in its brief to this Court and again at oral argument all but conceded that the vacatur is a fact supporting a claim. See Brief for United States 33; Tr. of Oral Arg. 13. Seeking a new rationale to imprison petitioner for an additional eight years on the basis of a prior Georgia conviction all of us know to be void, the Government defends the Court of Appeals' judgment on an alternative ground: Federal law requires diligence on the part of the defendant not only in bringing the vacatur to the attention of the federal court but also in commencing state proceedings to obtain the vacatur in the first place. According to the Government, petitioner's diligence should be measured from the time a petitioner could have obtained a vacatur, *i.e.,* as soon as the legal basis for vacatur existed. See Brief for United States 32–34. Although the Court adopts the Government's argument in part, it comes up with a date of its own choosing from which to measure a petitioner's diligence.

The Court is quite correct, in my view, to hold that the state-court order of vacatur itself is the critical fact which begins the Antiterrorism and Effective Death Penalty Act of 1996's 1-year limitations period. §101, 110 Stat. 1217. *Ante*, at 12. It is an accepted use of the law's vocabulary to say that the entry or the setting aside of a judgment is a fact. *Ante,* at 10. An order vacating a judgment is a definite and significant fact of litigation history. So the Court is on firm ground to say a state judgment of vacatur begins the 1-year limitations period. Even aside from the textual support for petitioner's position, our opinions in

Custis v. *United States,* 511 U. S. 485 (1994) and *Daniels* v. *United States,* 532 U. S. 374 (2001), were decided on the understanding that Congress did not expect federal sentences to be enhanced irrespective of the validity of the state conviction relied upon for the enhancement. *Ante*, at 9. Those cases suggest that the proper procedure for reducing a federal sentence enhanced on the basis of an invalid state conviction is to seek a vacatur of a state conviction, and then proceed through federal habeas.

The Court is correct, too, to say that the whole problem of vacating state-court judgments fits rather awkwardly into the language of §2255, ¶6(4). *Ante*, at 12. That is because ¶6(4) is designed to address myriad claims, including post-trial factual discoveries such as violations of *Brady* v. *Maryland*, 373 U. S. 83 (1963), witness recantations, new exculpatory evidence, and the like. Having gone this far, the Court in my view should simply accept that §2255, ¶6(4) is not a particularly good fit with the vacatur problem.

The Court, however, does not accept the consequence of its own correct determination. Instead it finds a need to make the words "discovery" and "due diligence" more applicable to the instance of vacatur. Hence it adopts the second requirement: "[W]e also hold that the statute allows the fact of the state-court order to set the 1-year period running only if the petitioner has shown due diligence in seeking the order." *Ante*, at 6. This added condition cannot be found in the statute's design or in its text. It creates, furthermore, its own set of problems. Section 2255, ¶6(4) neither requires nor accommodates the Court's federal rule of diligence respecting state-court proceedings.

II

The 1-year period begins from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28

U. S. C. §2255, ¶6(4). As the Court agrees that vacatur is the fact which begins the 1-year period, it would seem to follow that the diligence requirement pertains to presenting the fact of vacatur to the federal court. A petitioner cannot discover the vacatur until it issues. If the State has allowed the vacatur subject to its own rules respecting timely motions or applications and if petitioner has acted diligently in discovering entry of that vacatur, the proper conclusion is that he may bring a §2255 petition within one year of obtaining the vacatur, or one year of reasonably discovering it.

The only way the majority's construction can fit the statute is if the controlling fact is the circumstance giving rise to the vacatur, not the vacatur itself. Yet the majority resists that proposition, for it measures the 1-year period from the date the vacatur is ordered. *Ante*, at 13.

The majority rejects petitioner's proposed construction of the "discovered through the exercise of due diligence" language, which I would adopt, for two reasons. First, the Court observes it is "strange to say that an order vacating a conviction has been 'discovered,' and stranger still to speak about the date on which it could have been discovered with due diligence, when the fact happens to be the outcome of a proceeding in which the §2255 petitioner was the moving party." *Ante*, at 10–11. By bringing vacatur proceedings, petitioner himself causes the factual event to occur, and his discovery of it is "virtually guaranteed." *Ante*, at 11. The Court is concerned that the due diligence language does barely any work under petitioner's interpretation because the language is too easily satisfied.

Though I agree it is a bit awkward, in my view it is well within the realm of reasonable statutory construction to apply the term "discover" to an order vacating a conviction. The ordinary meaning of the term "discovery," after all, is "the act, process, or an instance of gaining knowledge of or ascertaining the existence of something previ-

ously unknown or unrecognized." Webster's Third New International Dictionary 647 (1993). See also Black's Law Dictionary 465 (6th ed. 1990) ("[T]o get first sight or knowledge of"). There may be instances when there is a mistake in recording or entering the vacatur, or when it is not clear that the order in fact includes that relief, or when a prisoner's transfer or extradition reasonably causes the prisoner to learn of the order in some uncommon way. In these instances, admittedly infrequent, the word "discover" makes perfect sense. True, the due diligence language does not do much work when a petitioner receives prompt notice in the ordinary course. As explained, however, §2255, ¶6(4) is designed to cover various circumstances, and many other types of claims. *Ante*, at 12.

To bolster its prevacatur diligence requirement, the Court elects to resolve a case not before it, *i.e.*, a hypothetical involving DNA testing. *Ante*, at 14. Quite apart from the impropriety of deciding an important question not remotely presented in the case, the Court's resolution of its hypothetical is, in my view, far from self-evident. It has little to do, moreover, with the question of vacatur of a state-court judgment. We have a special obligation to the federal system to respect state-court judgments. Rather than imposing a federal rule of diligence on top of existing state-court rules for determining when a vacatur motion should be made, I would treat the critical fact as the date on which the state-court orders vacatur. That, after all, is the time when the grounds for the claim to be made in federal court (the claim that an enhancement was improper) have become established under conventional principles commanding respect for state judgments, or allowing them to be set aside.

The second reason the majority rejects Johnson's position is because it is troubled by the prospect that a petitioner "might wait a long time before raising any question

about a predicate conviction . . . ." *Ante*, at 11. Even if this concern were a sufficient basis for adding the majority's prevacatur diligence requirement to the statute and creating a two-tier diligence structure, the concern is overstated. In most instances, States can, and do, impose diligence by limiting the time for requesting a vacatur of a prior state conviction. It was represented at oral argument that all but about six States impose a limitation by statute or laches. Tr. of Oral Arg. 10. Even in those six States, furthermore, it is not clear that equitable defenses would not apply. *Id.*, at 17–18.

Any States that do not impose time limitations are free to do so if deemed necessary to protect the integrity of their own judgments, so a federal time limit is not required. This is illustrated by the instant case. When Johnson sought state relief, Georgia imposed no limitation on a petitioner's ability to obtain a vacatur. *Ante,* at 9, n. 5. Since then, however, Georgia has enacted a 4-year limitations period for proceeding to obtain a vacatur. The majority's apparent concern that, absent its interpretation of §2255, ¶6(4), petitioners have some incentive to delay proceedings to vacate a conviction seems quite unfounded.

The majority's construction, furthermore, can allow for the same delay it seeks to avoid. After all, the Court holds that the due diligence requirement is triggered only by a federal judgment. Consider a simple hypothetical. Suppose that a petitioner suffers a state conviction in 1980, and, despite learning in 1985 that his conviction is constitutionally infirm, does nothing. Suppose further he is sentenced for a federal crime in 2000. Under the majority's view, the petitioner's obligation to question his state conviction is not triggered until 2000, a full 15 years after he knew the basis for vacatur. Despite the adaptation it makes to §2255, ¶6(4), the majority has failed to create an incentive for petitioner to act promptly in instituting state proceedings. The incentive exists under state law, and the

Court does not need to supplement it.

The error of the majority's position is further revealed by its selection of what I consider to be an incorrect date for triggering the prevacatur diligence requirement. It holds that the triggering event is set at the date of petitioner's federal judgment. *Ante*, at 14 (setting November 29, 1994, the date of judgment, as the date triggering the diligence requirement).

This rule of the Court's own contrivance is adopted, in my respectful submission, without full appreciation for the dynamic of the criminal process and its demands on counsel. Assuming for the moment that some event in the federal court should start the time period for pursuing state relief, surely the entry of judgment is ill chosen. This means the judgment is a mandatory beginning point for collateral proceedings to correct a judgment and sentence not yet final.

If the Court wants to invent its own rule and use an event in the federal criminal proceeding to commence a limitations period (and I disagree with both propositions), the date the judgment becomes final, not the date of judgment in the trial court, is the proper point of beginning.

The law, and the decisions of this Court, put extraordinary demands on defense counsel. Immediately after a judgment, defense counsel must concentrate on ensuring that evidence of trial misconduct does not disappear and that grounds for appeal are preserved and presented. Today the Court says defense counsel must divert scarce resources from these heavy responsibilities to commence collateral proceedings to attack state convictions.

In this case seven different convictions in Georgia may have been relevant. In other cases convictions that might enhance have been entered in different States. See, *e.g., Custis*, 511 U. S., at 487. It is most troubling for a Court that insists on high standards of performance for defense counsel now to instruct that collateral proceedings must

be commenced in one or more States during the critical time immediately after judgment and before appeal.

If the Court is to insist upon its own second tier of diligence, the dynamics of the criminal system and ordinary rules for determining when collateral proceedings become necessary should instruct us that, for federal purposes, this tier begins when the federal conviction becomes final. This also ensures that the federal court does not make demands on counsel and on state courts that are pointless if the federal conviction is overturned. Perhaps the Court rejects the date of final judgment as triggering its requirement because it adds little to the state requirements of diligence. If this surmise is correct, of course, it demonstrates that the Court should not adopt its interpretation in the first place.

Aside from diverting resources from a petitioner's federal case, the majority's approach creates new uncertainty, giving rise to future litigation. It leaves unsaid what standard will be used for measuring whether a petitioner acted promptly, forcing litigants and lawyers to scramble to state court in the hopes they satisfy the Court's vague prevacatur diligence requirement. The Court tells us nothing about what to make of existing state standards regarding diligence. Assume a State has a 4-year limitations period for bringing a vacatur action and a petitioner acts within two years of his state conviction. Do we look to state law as a benchmark for what should be presumed to be diligent? The murkiness of the Court's new rule will set in motion satellite litigation on this and related points.

In lieu of adopting an interpretation that creates more problems than it avoids, I would hold that the order vacating a prior state conviction is the fact supporting a §2255 claim, and the statute is satisfied if the §2255 proceeding is commenced within one year of its entry, unless the petitioner shows it was not reasonably discovered until later in which case that date will control when the statute

begins to run. For these reasons, I would reverse the judgment of the Court of Appeals.